Supreme Court, U.S.
FILED
FEB 16 2005
OFFICE OF THE CLERK

(4)

No. 04-905

In the Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,

Petitioner,

v.

REEDER-SIMCO GMC, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases:

Best Brands Beverage, Inc. v. *Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987) 3

Boise Cascade Corp. v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988) 4

Falls City Indus., Inc. v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983) 4

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948) 3, 4

Great Atl. & Pac. Tea Co. v. *FTC*, 440 U.S. 69 (1979) 7

In re Boise Cascade Corp., 107 F.T.C. 76 (1986), rev'd, 837 F.2d 1127 (D.C. Cir. 1988) 4

M.C. Mfg. Co. v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied, 424 U.S. 968 (1976) 6

Terry's Floor Fashions, Inc. v. *Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985) 6

Texaco Inc. v. *Hasbrouck*, 496 U.S. 543 (1990) 7

Statutory Provisions:

15 U.S.C. § 13(a) 9

TABLE OF AUTHORITIES—Cont'd

Page(s)

Miscellaneous:

14 HERBERT HOVENKAMP, ANTITRUST LAW (1999) 7

REPLY BRIEF FOR PETITIONER

There ought to be a law. Or so respondent, Reeder, believes. If "a manufacturer of any product * * * establish[es] different pricing schemes for different dealers, similarly situated," there should be a statutory violation even if "Dealer A (the disfavored dealer) could not point to customers who actually shopped among those dealers – including both Dealer A and Dealer B – and chose to buy a given unit from Dealer B who received a lower price from the manufacturer." Br. in Opp. 27.

Whether or not there ought to be such a law, the Robinson-Patman Act is certainly not a statute that forbids such "discrimination." The Eighth Circuit's decision to the contrary cannot be reconciled with the text of the statute or prior interpretations of it by other courts of appeals. That decision extends the RPA to award treble damages to purchasers who claim that they could earn higher profits in *inter-brand* competition if only their supplier would charge them less. Such claims will be indisputably true in virtually every case, but are legally irrelevant. The RPA imposes limited restrictions on price discrimination that affects *intra-brand* competition; it does not broadly forbid price discrimination affecting inter-brand competition. The Eighth Circuit has extended the statute beyond its clearly expressed limits in a way that, if not corrected, will harm competition and injure consumers. Unless this Court acts, the Eighth Circuit's wildly erroneous decision (by a divided panel) will foster enormous amounts of litigation as plaintiffs who previously would have known not to bring suit because of well-settled rules precluding recovery now are encouraged to sue over any price difference, whether or not it resulted in two sales at different prices and whether or not the plaintiff lost sales to a favored purchaser.

1. Reeder confirms, albeit indirectly and grudgingly, that the Eighth Circuit's affirmance of the jury's liability determination rests entirely on incidents in which Reeder (a) lost sales to competitors who were selling different brands of trucks and who did not purchase from Volvo and (b) lost one sale to a compet-

ing Volvo dealer, but was not a "purchaser" from Volvo in connection with that competition.

Reeder makes repeated references to evidence of the "diversion" of sales to favored Volvo dealers. In Reeder's usage, though, "diversion" means nothing more than a general decline in its sales of Volvo trucks while sales volumes of some other Volvo dealers increased. "Diversion" in this sense is undisputed, unremarkable, and common – which is one reason why the decision below, if it stands, will foster enormous amounts of litigation – but is legally insufficient to support RPA liability.

The evidence is abundantly clear, however, that with only one exception – the sale to Hiland Dairy that is addressed separately below – when Reeder's sales efforts were unsuccessful, it was because customers chose to buy a different brand of trucks from a non-Volvo dealer. Those customers did *not* turn to another Volvo dealer that purchased from Volvo at a price lower than the price Volvo offered to Reeder. The supposedly "favored" Volvo dealers were not even bidding for sales to those customers. Competition between Reeder and another Volvo dealer was the rare exception, as Reeder's own evidence shows. In particular, the sales by Westfall Volvo that are highlighted by Reeder as examples of the "diversion" of sales to a favored dealer, Br. in Opp. 4, were sales for which Reeder did not compete and does not claim to have competed; the sales were "diverted" only in Reeder's idiosyncratic usage of that term. Likewise, the transactions in which Reeder succeeded in selling trucks to Lane Freight, City of Fort Smith, New Hi-Way, and Sam Ludington, but claimed to have lost profits because of Volvo's supposed "discrimination," Br. in Opp. 3, were transactions for which no other Volvo dealer submitted a bid; Reeder competed for those sales only with non-Volvo dealers. See Pet. App. 4a-6a (describing "sales-to-sales" comparisons).

That is why Reeder ultimately is forced to argue that the RPA is violated even if "Dealer A" (a disfavored purchaser) and "Dealer B" (a favored purchaser) do not compete to sell to the same customer. See Br. in Opp. 27 (disputing the proposition

that Reeder and favored Volvo dealers "must be bidding for the same customer on the same truck"). That argument is inconsistent with the plain language of the RPA, which forbids discrimination only if it impairs a disfavored purchaser's ability to *compete* against any person who "receives the benefit of such discrimination."[1]

Reeder claims that *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), supports liability in this situation. Br. in Opp. 15. It does not. *Morton Salt* indicated, in *dicta*, that the competitive injury required under the RPA need not be proved with direct evidence that a disfavored purchaser lost sales when its customers turned away from it to buy from a favored purchaser. Such injury could also be shown by inference, based on proof that manufacturers "sell their goods to some customers substantially cheaper than they sell like goods *to the competitors* of these customers." 334 U.S. at 50 (emphasis added). After *Morton Salt*, courts have sometimes proceeded on the assumption, which is reasonable in many contexts, that a favored purchaser is a "competitor" to a disfavored purchaser if both of them operate in the same geographic area and at the same "functional" level, *e.g.* if both are wholesalers or both are retailers. The Eighth Circuit did so here, citing *Best Brands Beverage, Inc.* v. *Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987), as authority for that approach. Pet. App. 11a.

But the *Morton Salt* "inference" that Reeder points to says nothing about the nature of the competitive injury that the RPA requires; it addresses only the kind of evidence that is required

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[1] Reeder confusingly implies that its claim should be evaluated under an alternative competitive injury requirement set forth in the RPA, that the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." Br. in Opp. 13. But this alternative form of competitive injury is *more* demanding, not less. It requires proof not only that the *plaintiff's* ability to compete has been impaired, but also that this impairment of an individual competitor will harm competition in the market generally. See *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 49 (discussing distinction between the two kinds of competitive injury).

to prove the injury. In particular, nothing in *Morton Salt* suggests that sales lost to inter-brand competitors are a cognizable injury under the RPA. Rather, the opinion holds that a disfavored purchaser suffers the requisite injury if it is "handicapped *in competing with the more favored * * * purchasers* by the differential in price." *Morton Salt*, 334 U.S. at 50. And the Court's description of the kind of evidence required to support the inference of such injury – sales at lower prices "to the competitors" of disfavored purchasers – makes no sense if, as Reeder argues, the injury to be inferred encompasses lost sales in inter-brand competition. Such losses to inter-brand competitors are equally likely or unlikely, whether the favored purchaser competes against the disfavored purchaser or not. See Pet. 17.

Moreover, this Court has since made clear that any inference of injury that may be drawn from evidence of "substantial price discrimination between *competing* purchasers over time" may be "overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus., Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (emphasis added). If that causal connection exists in the first place (a dubious premise here), it is clearly broken when the evidence shows unambiguously, as it does in this case, that the favored and disfavored purchasers are not competing to sell to the same customers, even though they operate in the same geographic area and at the same functional level.[2] In that situation, the disfavored purchaser can lose sales or profits only to inter-brand competitors, an "injury" the RPA does not address.

[2] Reeder cites *In re Boise Cascade Corp.*, 107 F.T.C. 76 (1986), in support of its argument that it is sufficient to show that the favored and disfavored purchasers operate in the same geographic area and at the same functional level. Br. in Opp. 24. But Reeder fails to acknowledge the case's subsequent history. The FTC's decision was reversed – in a decision we cited in the petition (at 16 n.3) – because the FTC did not consider evidence that was offered to rebut the *Morton Salt* presumption. *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127 (D.C. Cir. 1988). "Robinson-Patman has not ushered in a bizarre rule of law that exalts theory 'no matter what' in the face of hard, cold facts." *Id.* at 1146.

The requisite causal connection between the discrimination and the injury is broken here for a second reason. Under the RPA, the plaintiff's injury must be caused by the seller's *discrimination* in price, not by the absolute level of the price. When the plaintiff is competing only against inter-brand competitors, it will always lose sales or profits if the price that it pays to its supplier is higher rather than lower, but the price that its supplier charges to some other purchaser that is not competing against the plaintiff will have no effect on the plaintiff's sales or profits. As Judge Hansen's dissent recognized in this case, "the *difference* in concessions offered to Reeder and the 'favored' Volvo dealers did not cause the lost sales or profits" to non-Volvo dealers. Pet. App. 31a (emphasis in original).

The record is clear that Reeder lost sales to a non-Volvo dealer, and not to a favored Volvo dealer, in every transaction in which it claims to have lost a sale because of Volvo's pricing practices, save one. See Pet. 5-7; Pet. App. 29a-30a (Hansen, J., dissenting). These competitive losses to non-Volvo dealers do not constitute a cognizable injury under the plain language of the RPA or its consistent interpretation before this case.

2. The only sale that Reeder lost to another Volvo dealer, the sale to Hiland Dairy, cannot provide the basis for RPA liability for a different reason: Reeder did not purchase from Volvo in connection with that transaction. See Pet. App. 4a, 31a. The RPA requires proof that discrimination in price "between different purchasers" has caused competitive harm and, because of this requirement, other courts have recognized that a discriminatory offer to sell cannot lead to RPA liability if the offer is not followed by a purchase. See Pet. 12-15. Recognizing this, Reeder relies, as the Eighth Circuit did, on the proposition that its "status" as a purchaser in unrelated transactions is sufficient to satisfy this prerequisite for any RPA violation. Thus, Reeder points to its purchases from Volvo in four transactions that could not properly result in liability (because, as ex-

plained above, Reeder did not compete against another Volvo dealer in any of those transactions) and claims that its purchaser "status" obviates proof that there was discrimination "between different purchasers" in connection with the sale to Hiland Dairy, the only transaction in which the requisite competitive effect – diversion of sales or profits to another Volvo dealer – could possibly have occurred. Br. in Opp. 12.

Because Reeder did not produce evidence of any transaction in which discrimination between purchasers produced the requisite competitive effect, its claim should have been rejected as a matter of law. Other courts of appeals have correctly applied this principle to reject RPA claims when a seller offered different prices to two firms that were bidding against each other for a sale, but only one of those firms (the winning bidder) ultimately purchased from the defendant. See Pet. 12-15 (discussing *Terry's Floor Fashions, Inc.* v. *Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985), and *M.C. Mfg. Co.* v. *Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), cert. denied , 424 U.S. 968 (1976)). The Eighth Circuit in this case did the opposite. Although it cited *Terry's Floor Fashions* and *M. C. Mfg.*, it did not follow them or distinguish them on the basis of any analysis that can survive even a cursory reading of the statutory language.

3. Reeder also confirms that, under its and the Eighth Circuit's interpretation, the RPA effectively imposes liability for every act of price discrimination unless the discriminating seller can prove that the price differences were cost justified or necessary to meet a competitor's price. See Br. in Opp. 23 ("The RPA prohibits price discrimination between two purchasers * * * as long as the sales to such purchasers are 'reasonably contemporaneous,' and the products sold are of 'like grade and quality.'"); *id.* at 28-29 ("Nothing in the RPA or the Eighth Circuit opinion prohibits a seller from offering its products at different prices to different buyers, so long as the reason for such difference is legitimate (e.g., 'cost justification' or 'meeting competition.'"). This is the logical implication of a

holding that losses of sales or profits in inter-brand competition may provide the basis for RPA liability. As Professor Hovenkamp explains, "[T]he mere payment of a higher price than someone else pays * * * would injure *any* purchaser of an input * * *." 14 HERBERT HOVENKAMP, ANTITRUST LAW ¶2333b, at 89 (1999) (emphasis added). As he further explains, however, "[T]his is not the injury that the Robinson-Patman Act contemplates. The injury [contemplated by the RPA] is * * * the loss of ability *to compete effectively with the favored purchaser*." *Ibid.* (emphasis added).

It is no answer to suggest, as Reeder does, that treble-damage liability may be avoided if the seller can prove that price differences are justified by differences in the costs of selling to different purchasers or by a desire to match a competitor's price. This Court has observed that the cost justification defense is available to RPA defendants "[i]n theory," but

> interposing the defense has proven difficult, expensive, and often unsuccessful. Moreover, to establish the defense a seller must show that the price reductions given did not exceed the actual cost savings, and this requirement of exactitude is ill suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors.

Texaco Inc. v. *Hasbrouck*, 496 U.S. 543, 561 n.18 (1990) (internal quotations and citations omitted). The "meeting competition" defense is equally problematic. A seller that wants to rely on the defense must have enough information about the price offered by its competitor to support a good faith belief, but the antitrust agencies have noted that this defense to RPA liability may perversely encourage anticompetitive information sharing and tacit collusion. See *Great Atl. & Pac. Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979).

In any event, Reeder offers no reason to disregard the plain statutory language, which requires proof of effects on intra-brand competition in order to make out a *prima facie* case,

merely because the statute permits defendants to assert affirmative defenses *if the elements of a violation have otherwise been made out*. Because a disfavored purchaser could plausibly assert losses to inter-brand competition in virtually every case, Reeder's proposed construction of the RPA would allow plaintiffs to establish a *prima facie* case whenever sellers charge different prices to different customers, effectively repealing the statutory requirement that such differences must cause the proscribed effects on competition, and effectively shifting to defendants the burden of proving that price differences are justified under one of the affirmative defenses. A greater invitation to bring litigation is difficult to imagine.

4. Reeder's brief paints a vivid picture of the state of competition in the heavy-truck market during the period of the alleged price discrimination. "[C]ompetition in heavy truck sales has been high since 1996 and profit margins in the heavy truck business have been relatively low since 1996." Br. in Opp. 6. Volvo's plant was operating at full capacity but was falling behind in its efforts to fill customer orders, while the industry in 1998 and 1999 "was well on its way to achieving all-time record volume." *Ibid.* "[C]ompetition was keen and dealer profit margins were narrow." *Ibid.* This is a picture of intense competition, a success story for antitrust policy and consumers.

This vibrant competition exists partly because of, not in spite of, the common industry practice of selective discounts of the kind challenged by Reeder – a practice that developed because truck manufacturers understood the RPA to permit discounts to be offered selectively in the circumstances presented by this case. If the RPA is extended to impose treble-damage liability for such selective discounting, sellers will simply charge a uniform but higher price, to the detriment of consumers and competition. That is why such unusual *amici* as the National Association of State Directors of Pupil Transportation Services – a group of *buyers* of school buses representing consumer interests – have sought leave to appear before this Court in support of certiorari.

The Eighth Circuit's fundamental error, if not corrected, will have harmful effects in every industry that is subject to the RPA, which reaches discrimination in the sale of any "commodities" "in commerce," 15 U.S.C. § 13(a). Recognizing the broad reach of the decision below, the National Association of Manufacturers and an array of *amici* from various industries have sought leave to file a brief in this Court in support of certiorari. The deleterious effect of letting the blatant errors below stand cannot be confined to the Eighth Circuit, even if other courts of appeals correctly interpret the statute, because manufacturers that distribute their products nationally will be at risk of treble-damage lawsuits by "victims" who can sue in the Eighth Circuit under the liberal jurisdiction and venue provisions of the antitrust laws. See Pet. 29-30. This Court's intervention is needed to reinstate the limits on the scope of the RPA that are expressed in the statute's language, to resolve the conflicts between the decision below and the decisions of other circuits that have correctly applied settled law, to allow RPA counselors to advise their clients using well-understood principles rather than the Eighth Circuit's idiosyncratic view of the statute, and to fend off an avalanche of unproductive, anti-consumer litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2005